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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-875

MYRTLE GREEN BURTON, Individually and in her Capacity as Representative of JAMES EARL GREEN, Deceased, et al.,

Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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October Term, 1974

No. 74-

MYRTLE GREEN BURTON, Individually and in her Capacity as Representative of JAMES EARL GREEN, Deceased, et al.

Petitioners,

v.

WILLIAM L. WALLER, Individually and as Governor of the State of Mississippi, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Myrtle Green Burton, Dale A. Gibbs, Tuwaine Davis Whitehead, Vernon Steven Weakley and Leroy Kenter, Jr., respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 18, 1974, which affirmed in all respects a judgment entered against them by the United States District Court for the Southern District of Mississippi.

Introduction

Plaintiffs sought damages for the deaths of two black persons and injuries to three others from a barrage of gunfire directed at a women's dormitory on the campus of Jackson State College, a virtually all-black college in Jackson, Mississippi, on May 15, 1970, by a contingent of 69 officers from the Mississippi Highway Safety Patrol (MHP) and the Jackson Police Department (JPD).

The case was tried before an all-white jury in the United States District Court for the Southern District of Mississippi. The jury found for all defendants against all plaintiffs. Motions for directed verdicts and judgments notwithstanding the verdicts were denied and petitioners appealed from the denial of those motions.

The Court of Appeals, resolving "all reasonable inferences in favor of defendants", *Burton* v. *Waller*, 502 F.2d 1261, 1266 (5th Cir. 1974) and assuming that a jury could have found that one or two shots from a small caliber pistol were fired at the officers from a window near the top of Alexander Hall, a five-story women's dormitory,* held nevertheless that the officers' firing was "an excessive cumulated use of deadly force", *id.* at 1272, and:

> "The barrage of gunfire far exceeded the response that was appropriate for a disturbance of the size of this one and under the circumstances which it faced. This conclusion is not judicial second guessing of officers faced with danger, rendered from the quiet and safety of judges' chambers. It is what the evidence shows. The testimony touching

*As we indicate below (pp. 11-12), there is substantial reason to reject that testimony as incredible, but for the purpose of argument only we assume it to be true because it makes no difference to the result to which we believe petitioners are entitled—judgment as a matter of law. We took precisely the same position below and did not "concede", as the Court of Appeals said, 502 F.2d at 1269 n.3, that the jury could so find.

> the issue of appropriate response from a large detachment coming under sniper fire uniformly rejected as unacceptable the barrage that took place at Jackson State." *Id.* at 1271-72.

Moreover, in the case of seven particular officers, the Court of Appeals held that "they were guilty of tortious conduct as a matter of law". *Id.* at 1286. Equally, it condemned the reaction of the entire mass of officers when it found that "on the night of May 15 there ensued a confused mass reaction during which, as the supervisory officers acknowledged, they lost control of the men under their supervision". *Id.* at 1285.

We have reproduced on the facing page a copy of PX-45 (which also appears at 502 F.2d at 1266) and have marked it to show where the dead and wounded were shot*—far from the supposed sniper whose alleged location is also indicated on the marked copy of PX-45. As the Court found:

> "Under the evidence, the fire was excessive in volume and in intensity, and the size of the area subjected to fire was beyond the physical limits of [any] justifiable response." *Id.* at 1272.

The intensity of the firing into that crowded women's dormitory is demonstrated by examination of PX-133 (a close-up of the West Wing of Alexander Hall taken the

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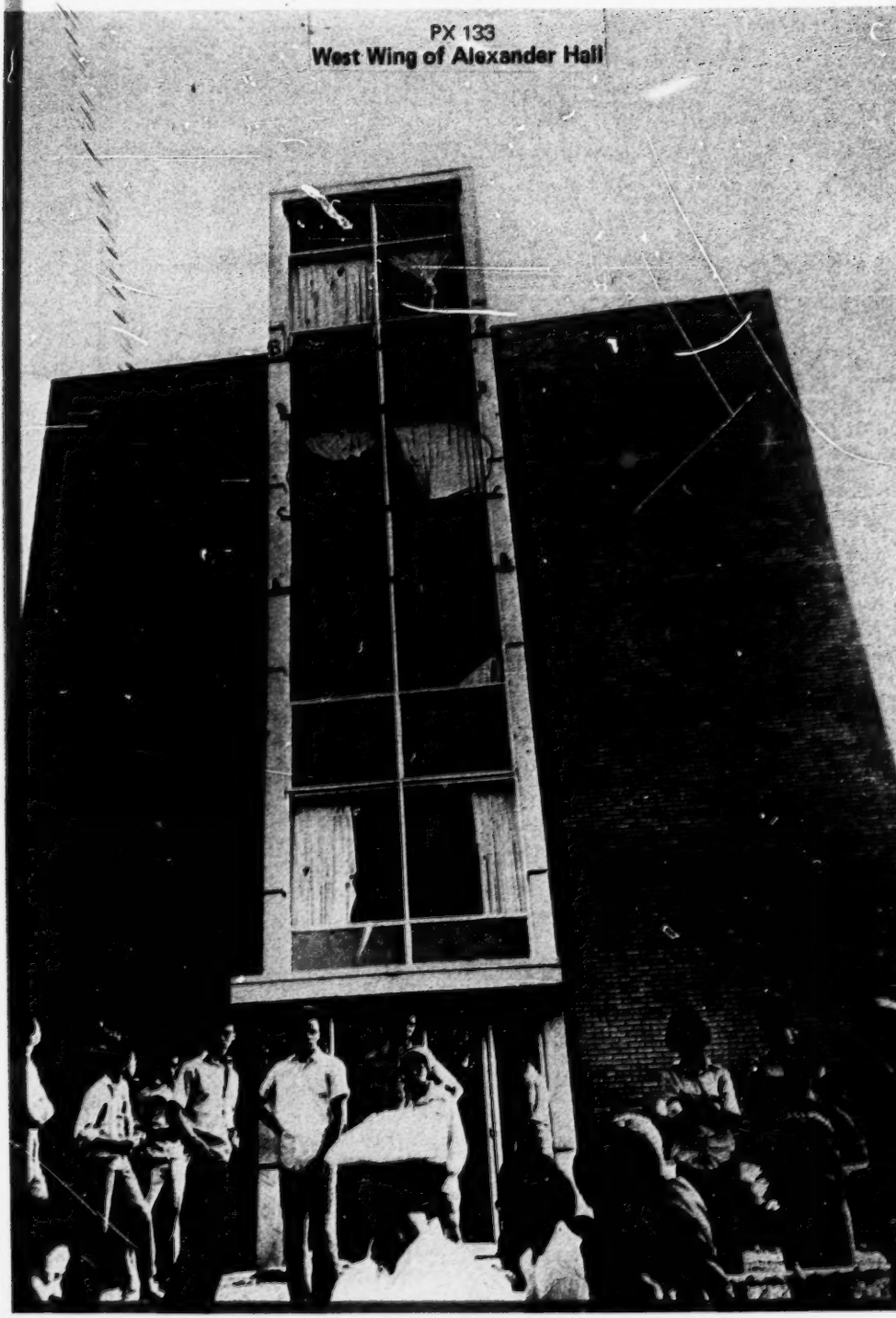
*Petitioners or their decedents have been located as indicated in the Court of Appeals' opinion, 502 F.2d at 1271, as has been the "sniper", *id.* at 1269, while the other victims have been located by trial testimony. (Tr. 445, 531-34, 751-56, 814, 831-32, 848-51, 896-97.) The 43 Mississippi Highway Safety Patrolmen were clustered in the street in front of the West Wing of Alexander Hall, approximately between the spot indicated as the location of R. Wilson and the alleyway to the left of the West Wing on PX-45. The JPD officers were just to the east (right) of them. A large armored vehicle, Thompson's Tank, was stopped directly in front of the West Wing in the middle of the police contingent. (PX-184, Tr. 2794.)

PX 45

Scene of the Barrage
(Marked to Indicate Location of Victims
and the Alleged Sniper)

4

PX 133
West Wing of Alexander Hall



day after the shooting) which has been set out following PX-45.*

Despite these conclusions, the Court of Appeals failed to hold any person or entity liable.

Opinions Below

The opinion of the Court of Appeals is reported at 502 F.2d 1261 (5th Cir. 1974), and is set out in Appendix C.

The District Court orally denied petitioners' motions for judgments notwithstanding the verdicts on April 5, 1972. See Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In light of the Court of Appeals' findings which (with "all reasonable inferences in favor of defendants") establish that:

First, the "barrage of [police] gunfire" which caused the deaths and injuries constituted "an excessive cumulated use of deadly force";

Second, those shooting violated the "standards generally accepted by law enforcement agencies" and disobeyed specific cease fire orders;

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*Larger copies of both PX-45 and PX-133 have also been filed with the Clerk as exhibits to this petition.

Third, at least seven officers "were guilty of tortious conduct as a matter of law" and all 43 officers who shot contributed to an "excessive" and "confused mass reaction";

Fourth, petitioners or their decedents were innocent bystanders shot far outside the "physical limits of [any] justifiable response"—

The principal questions are:*

1. Whether petitioners can be left without any remedy for damages resulting from death and injury in a suit under the Constitution, the Civil Rights Acts of 1866 and 1871, and Mississippi law, and specifically

(a) Whether individual police officers can escape liability because the magnitude of their collective wrongdoing makes it impossible to determine which particular officers fired the shots which caused the deaths and injuries complained of?

(b) Whether the "excessive cumulated use of deadly force" causing these deaths and injuries outside the "physical limits of [any] justifiable response" can be "justified" on theories either of suppression of riot (which the defense expressly rejected as a justification) or of self-defense?

(c) Whether it is the law that black students in Mississippi can be held to have "assumed the risk" that white police officers would, without warning, suddenly engage in a wrongful "confused mass reaction" resulting in "an excessive cumulated use of deadly

*In the event certiorari is granted, petitioners will urge other questions, properly preserved and presented to the Court of Appeals, as grounds for reversal. These questions relate to the instructions to the jury and are listed in Appendix I.

force" directed far outside the "physical limits of [any] justifiable response"?

2. Whether a state or municipality can be excused from liability for the wrongful acts of its agents under these circumstances on the theory of sovereign immunity when petitioners' claims arise under the Fourteenth Amendment, which was enacted specifically to limit the sovereignty of the states over precisely those federal civil rights of petitioners which were violated?

Constitutional Provisions Involved

The constitutional provisions involved are the Supremacy Clause (Article VI, Clause 2) and the Eleventh and Fourteenth Amendments, set forth in Appendix A.

Statutory Provisions Involved

The statutory provisions involved are (a) Section 1 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) and Section 3 of the Civil Rights Act of 1866 (42 U.S.C. § 1988); (b) the Mississippi Wrongful Death Act [Miss. Code Ann. § 1453 (1942) (now Miss. Code Ann. § 11-7-13 (1972))]; and (c) 28 U.S.C. §§ 1331, 1343. All statutory provisions are set forth in Appendix B.

Statement of the Case

1. *The Petitioners.* Petitioners are the survivors of two young men killed at Jackson State and three students who were wounded. Myrtle Green Burton represents her dead son, James Earl Green—a 17-year-old high school student. Phillip L. Gibbs, a 21-year-old Jackson State student when he was killed, is survived by his wife, peti-

tioner Dale A. Gibbs, and two children. Tuwaine Davis Whitehead and Vernon Steven Weakley were both 19-year-old Jackson State students when shot, while Leroy Kenter, Jr., was a 20-year-old sophomore.*

2. *The Defendants.* The original defendants were (i) all 69 officers in the detachment from which the gunfire came (43 from MHP and 26 from the JPD); (ii) various officials, not present at the scene, who had supervisory and training authority; and (iii) the State of Mississippi and the City of Jackson.

Four MHP and 20 JPD officers who testified they did not fire were dismissed from the suit on petitioners' motion (except for two supervisors at the scene who remained as defendants). Additional individual defendants who were not present at the scene of the shootings, including former Mississippi Governor Williams, were dismissed from the action before or during trial on petitioners' motion.** The only remaining individual party not present at the shooting is Giles Crisler, Mississippi Commissioner of Public Safety and head of the MHP.†

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*The suit was brought under the Fourteenth and other amendments to the Constitution, 42 U.S.C. § 1983, the Mississippi Wrongful Death Act, Miss. Code Ann. § 1453 (1942) [now Miss. Code Ann. § 11-7-13 (1972)] and the Mississippi common law. Federal jurisdiction is conferred by the Fourteenth Amendment, 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 1331, 1343. The federal court has jurisdiction over the state claim because it and the federal claims arise from the same nucleus of operative facts. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); *see Rosado* v. *Wyman*, 397 U.S. 397, 402-05 (1970); *Burton* v. *Waller*, 502 F.2d 1261, 1265 n.1 (5th Cir. 1974).

**The Court of Appeals kept the Governor in the caption and substituted the name of the current Governor.

†Crisler was responsible for the MHP firearms control training the Court of Appeals found "clear[ly]" "deficient". 502 F.2d at 1285. But the Court then held the jury might have found that Crisler used "due care". *Id.*

3. *The Witnesses.* In addition to their own testimony, petitioners offered the testimony of 96 witnesses,* including eleven Jackson State students and 69 officers at the scene.

The FBI made an exhaustive investigation of the Jackson State shootings and detailed study of the effects of the barrage. 502 F.2d at 1271. Testimony of four agents and one other employee of the Federal Bureau of Investigation also offered by petitioners set forth the results of that investigation and established that the firing originated "where the MHP patrolmen had been clustered". *Id.* Based on the physical evidence of the extent and effects of the barrage, the Court of Appeals concluded that "the size of the area subjected to fire was beyond the physical limits of [any] justifiable response". *Id.* at 1271-72.

In addition, petitioners called an independent expert on crowd control procedures and the officials in charge of training for the JPD, the MHP and the Mississippi National Guard. Each of these witnesses "uniformly", *id.*, supported the Court's conclusion that the barrage of firepower was "excessive" and "unacceptable", *id.*, because, as stated by defendants' own expert training officers:

> "[W]hen you open up on a group of people, a lot of innocent people become involved in fire power". (Tr. 2827-28)

4. *The Shootings.* Petitioners contend that the facts set forth by the Court of Appeals establish liability as a matter of law. The facts were stated "with all reasonable inferences in favor of defendants". 502 F. 2d at 1266.

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*Defendants offered the testimony of only two witnesses, who added little, if anything, to the testimony previously presented by the plaintiffs.

Nevertheless, the opinion of the Court of Appeals makes it clear that innocent people were killed and wounded because of the "excessive cumulated use of deadly force"—a barrage fired at point blank range [10 yards to the students at ground level (Tr. 1790-91)] at students who were obeying an order to disperse, and a barrage which continued despite repeated orders to cease fire. 502 F. 2d at 1270.

At the trial, the testimony differed on only one major issue (resolution of which is not necessary)—whether a lone sniper in the second window from the top of the West Wing of the women's dormitory fired at most one or two shots from a small caliber pistol at the officers just before they unleashed their barrage.

Petitioners submit that their own testimony, that of student witnesses, the physical facts uncovered by the FBI,* the striking failure of any of the officers to seek readily available cover,** or even to look for a sniper after the shooting was over, and the instantaneous decision by the officer in charge to order a cease fire, 502 F.2d at 1270,

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*As a justification for its conclusion that a jury could have found there was a sniper, the Court of Appeals set out testimony that "[a]t least 18 patrolmen testified to seeing two or three muzzle flashes come from the eastern pane" of the large window second from the top of the dormitory. *Id.* at 1270. *But,* on the next page, the Court sets out the incontrovertible physical facts stemming from the FBI report, proving this testimony was false. Without comment, the Court states:

> "[T]he eastern portion of the second window from the top, the pane behind which the sniper had been located by the testimony and at which numerous patrolmen had directed their fire, was unmarred". *Id.* at 1271. (Footnote omitted)

Since that window could not be opened (Tr. 1795), it is plain that no one fired out of that portion of the pane or into it.

**Not a single officer stepped behind its protective cover of the adjacent "Thompson's Tank", a JPD armored truck over 23 feet long and 8 feet high. (Tr. 1202)

proved as conclusively as it is ever possible to prove a negative that any testimony about a sniper cannot be credited. But, for purposes of seeking judgment notwithstanding the verdict, we have assumed (as did the Court of Appeals) that a jury could have found that a sniper in the second window from the top of the West Wing of the dormitory did fire those one or two shots.

The point is that, whether or not there was any such lone sniper, the deaths and injuries here were tragically unlawful. *First,* petitioners (with one possible exception) were nowhere near the site of the alleged sniper. They were innocent bystanders and no one even tried to justify shooting in their direction. Plainly, such shooting was outside "the physical limits of [any] justifiable response". *Id.* at 1272. *Second,* the outside experts, the men's own training officers, and the commanding officers at the scene all agreed that such an undisciplined barrage of gunfire was excessive and improper even if (contrary to fact) it had been solely directed at the location of the alleged sniper.

The facts, established by the Court of Appeals' findings, which require a judgment of liability include the following:

a. As the Court found, the "barrage of gunfire" was *an "excessive cumulated use of deadly force".* Shortly before midnight on May 14, 1970, a contingent of 69 officers marched down Lynch Street, a major road (shown in the foreground of PX-45, p. 4, *supra*) which bisects the Jackson State campus.* Students followed the march.

*The officers were on the campus because of student disturbances which had occurred earlier that night. There had been disturbances the previous night which had included verbal abuse, rock throwing, the burning of some trash containers, and an attempt to burn the Army ROTC building. The crowds dispersed (without gunfire). After an ordinary day of college activities, disturbances broke out again on the evening of May 14. There was rock throwing and a privately-owned dump truck was set afire. In addition, one officer (Inspector Lloyd Jones), but none of the other officers present,

By the time the police contingent reached the West Wing of Alexander Hall (shown at the center of PX-45, p. 4, *supra*), there was a crowd of three or four hundred students in the street and in front of the West Wing. It was "unruly". 502 F. 2d at 1269.

Lieutenant Magee, the commanding officer, halted the march and "used his bullhorn to order the students to disperse, and the crowd began complying". *Id.* But because the students had to pass through a narrow gate, the process of dispersion went slowly and while the officers waited, "more objects were thrown at them, and Lt. Magee was hit by one of the missiles". *Id.* Nevertheless, because the students " 'were withdrawing from the street area and dispersing' ", *id.*, Lt. Magee did not consider it necessary to use any form of physical force, including tear gas, because " 'the people were complying with my request' ". *Id.*

At this point, 38 MHP patrolmen and 5 JPD policemen almost simultaneously opened fire at a distance of less than twenty yards; they "panned" the obviously crowded women's dormitory from top to bottom. (Tr. 2547-49) Their firing raked the dormitory, its center section, and its East Wing. The area of their firing even included the opposite side of Lynch Street where James Earl Green was killed. 502 F.2d at 1270-71.

Their weapons included shotguns,* "personal" military

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testified that before he arrived on campus he had heard that a fire truck was fired on. (Tr. 2422-23) After a bottle was subsequently thrown at a group of MHP patrolmen led by Inspector Jones, "one or more of them responded with gunfire". 502 F.2d at 1268-69. The Court described this gunfire as hitting the "side" of Stewart Hall—in fact it smashed through a window into a dormitory room. (PX 160-PX163) But that time, fortunately, no one was hit. 502 F.2d at 1267-69.

*The MHP patrolmen's shotguns had been loaded with 00 buckshot and the JPD policemen's with number 1 buckshot. Shells of that size contain nine pellets, each approximately the diameter of a .30 caliber bullet. 502 F.2d at 1269. In contrast, the Mississippi

carbines, two submachine guns and a .308 rifle. *Id.* at 1269. During the 29 seconds of firing, the officers "discharged from 121 to 153 rounds of ammunition containing between 793 and 1,001 separate projectiles". *Id.* at 1270.

The impropriety of that barrage of gunfire was immediately established by the instant reaction of the commanding officer, Lt. Magee, who, as the Court found, "repeatedly called for the men to cease fire". *Id.*

Despite his immediate effort to regain control, and despite the repetition of his futile orders by three other officers, *id.*, the patrolmen persisted until they had shot up the entire front of the West Wing from the top (where the supposed sniper was located) to the ground, as well as shooting at the dispersing crowd of students, the rest of the dormitory and even across the street. 502 F. 2d at 1270-71.

b. As the Court also found, the expert testimony—including that of experts employed by the MHP and JPD—established that the firing was contrary to "universally accepted" law enforcement standards. Wesley Pomeroy, a career law enforcement officer and an expert in control of civil disturbances who had previously advised the JPD, testified for plaintiffs. As the Court recited, he testified "without contradiction" that

> "according to standards generally accepted* by law enforcement agencies throughout the United States, firepower of the kind used at Jackston State was never an appropriate response to sniper fire, par-

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National Guard, who were in reserve and whose procedures reflected greater attention to the risk of injury to third persons, had been instructed to carry unloaded shotguns and "on command" they were to load first with number 9 birdshot so as to minimize injuries. *Id.* at 1272. (Tr. 2599)

*In his testimony Pomeroy re-emphasized these words by adding "universally accepted". *Id.* at 1273.

ticularly when there are large numbers of people in the vicinity." *Id.* at 1273.

Pomeroy's expert testmony on the standard of care was confirmed by (i) testimony of the chief training officers of both police departments involved, (Tr. 975-77; 2824) (ii) testimony of the commanding general of the Mississippi National Guard, 502 F.2d at 1272, and (iii) United States Army training procedures. (Tr. 930-45; GX 3) Illustrations follow:

(1) *MHP Training.* Chief training officer William M. Jones testified:

> "Q. Now, Officer Jones, does any part of the training include training for a situation where someone may be firing at the officers but there are people not firing at the officers in the line of fire the officers would have to use were they to return the fire of the person firing at them?
>
> "A. Do we teach that they return fire into the sniper that is firing at them with people around the sniper? Is that your question?
>
> "[Q.] Yes.
>
> "A. No, we don't teach that. You do not shoot innocent people because someone is shooting at you. You do not want to take an innocent life. The method that you would use would be left up to the person in charge—to disburse [*sic*] and maybe some way get the sniper out of there without firing into a mass of people. This would be left again, up to the person in charge." (Tr. 976-77)

(2) *JPD Training.* Chief training officer C. R. Wilson testified:

> "[W]e instructed our officers not to fire unless they're given a command to fire and then only fire when the commander of the task force tells them.

"Q. Even if a sniper was firing at them?

"A. Right." (Tr. 2824)

* * *

"Q. And why is it important to have control over the men and complete charge over the fire power that's laid down?

"A. Because when you open up on a group of people, a lot of innocent people become involved in fire power." (Tr. 2827)

(3) *Mississippi National Guard Training.* Commanding General Walter Johnson's testimony, which was quoted by the Court of Appeals, makes precisely the same point:

"'Q. Under what circumstances would an order be given to return fire? [Except for small patrols, the Guard permits return fire only upon the command of an officer to load and fire.]

"'A. If we actually took fire—in other words a ricochet by your foot or something like that—now we are not going to fire into a crowd because we've picked up one. But if we can isolate this man we will first try to capture him, but if he can't be captured he will be [k]illed. We have specially trained sniper teams with sniperscopes, infra-red night firing sniperscopes. We have heav[y] lights. Very often, as has been reported, say, in Watts, you will get a lot of sniper fire from tops of buildings or from the dark, and we will try to search out and put a stop to that.

"'Q. If your men were in front of a darkened building and sniper fire started coming from a

window, what would their response be according to your standard operating procedure?

"'A. Probably give the order to take cover and disperse immediately. No point in just standing there. We would take cover and protect ourselves and the special sniper teams would attempt to search out, seize or destroy.'" 502 F.2d at 1272.

As the Court further noted, the two sergeants of the JPD "who were trained, equipped and designated to deal with snipers never fired". *Id.* at 1273.

c. Even if—contrary to the preceding findings which demonstrate the illegality of the officers firing at all—some firing might have been excused, the firing which killed or wounded petitioners or their decedents was unlawful because it was "beyond the physical limits of justifiable response". Here again, the testimony of the officers themselves and their own training officers established that there was absolutely no excuse or justification for shooting at the persons on the ground or other areas away from the supposed sniper:

First, the failure of a single officer to seek to justify such shooting bespeaks their knowledge that no justification was possible.

Second, the impropriety of the shootings at issue was conclusively established by the uncontradicted and unchallenged expert testimony of the Mississippi Highway Safety Patrol's chief training officer. He was shown PX-133 (reproduced *supra* at p. 5 and in the Court's opinion at 502 F.2d at 1267) and asked to assume that the MHP officers in the street were fired on by a sniper in the second window from the top (the window circled). (Tr. 1036-48) Based on that assump-

tion, he testified that he could "not explain" (Tr. 1040) the damage shown on PX-133 outside lines A-A and B-B because if the MHP officers had fired according to their training in response to such a sniper (assuming, contrary to fact, that the MHP training or "generally accepted" standards, or the repeated orders to cease fire, permitted any firing at all under the circumstances) all shotgun shot would have struck the building between those lines. He further explained that the only damage which could properly have resulted from rifle or pistol fire would have occurred between lines C-C and D-D. (Tr. 1042-48)

Four of the five petitioners or their decedents—all except Mrs. Whitehead, who was inside the dormitory—were way outside those "physical limits" of justifiable response established by the MHP expert. Thus, even under the theories of the Court of Appeals, the shooting which resulted in the killing and wounding of those four could not have been part of any "justifiable response".

5. *Despite the official wrongdoing established by its findings, the Court nevertheless denied petitioners any relief.* The undisputed facts of record lead inexorably to a conclusion of liability as a matter of law. Yet the Court of Appeals held no one could be held responsible for the shootings because it speculated that a jury might have found that some of the officers did not fire unlawfully or did not hit petitioners or their decedents. It even denied relief against those officers it held were "guilty of tortious conduct as a matter of law".

In order to reach this anomalous result, the Court ignored the constitutional and legal principles of a free society, which restrain official misconduct, relied upon tortured

and erroneous analysis of arcane tort law, and failed to apply its own findings of fact:

First, the Court was impressed by the fact that a jury verdict had been returned for each of the defendants. *But,* the undisputed facts, as found by the Court itself, demonstrate that the shootings of petitioners and their decedents were unlawful as a matter of law and should never have been submitted to a jury. Moreover, the instructions to the jury were improper, although the Court took the unexplained position that it was "unnecessary" to deal with all the charges (including the charge under which the jury was permitted to return a general verdict for the defendants if they found plaintiffs assumed the risk of being shot as a result of an excessive cumulated use of deadly force). *Id.* at 1286.

Second, in so far as the individual officers were concerned, the Court held that each individual must be free from liability because "harm may have resulted from sources other than those acting tortiously". 502 F.2d at 1283.

But, to reach that conclusion, the Court forgot its own findings, speculated that a jury might have found "justifications" that the defendants had specifically and repeatedly renounced, and created rules of law which—for all the Court's own condemnations of the shootings as "excessive" and "beyond the physical limits of justifiable response"—provide a license for future use of excessive deadly force.

Given the places where petitioners or their decedents were killed or wounded, there is simply no way to conclude that "harm may have resulted from sources other than those acting tortiously". No one ever admitted or

attempted to justify shooting at those places and, under the Court's own findings, no one—court, jury or defendants—could do so.

Thus, the Court's hypothesis that a jury could have found that some of the officers may have shot lawfully is an abstract irrelevancy. It is irrelevant to the necessary conclusion that petitioners or their decedents were in fact shot unlawfully. Moreover, the hypothesis itself stems from the dangerous creation of a new theory of "self defense" in a constitutional case and at the same time an abandonment of traditional limitations upon that defense, as well as creation of a new and dangerous law of "riot" which even defendants and their counsel had repeatedly disclaimed. (*infra*, pp. 36-37)

Third, the Court held that the officers' employers, the City of Jackson and the State of Mississipi, were immune from suit. *But* the defense of immunity here is not consistent with our constitutional history which imposed the Fourteenth Amendment upon the states in order permanently to reverse the doctrine of state sovereignty over the right to life and liberty and to "assure redress", through "the power and majesty of American law". (*infra*, pp. 23-30)

Reasons for Granting the Writ

Summary

This Court should grant the writ because this case raises important constitutional and legal questions regarding the relationships between governments, government officials, citizens, and courts, which were wrongly decided below. Put bluntly and simply, the holding below is that if enough white officers act unlawfully and use such excessive deadly force that it is impossible to tell which officers fired which shots, their black victims have no redress for the unlawful

deaths and injuries they suffered. Unless corrected, the result below will shield from liability official lawlessness if it is committed on a big scale. Thus:

First, and most important, this case raises the question whether innocent bystanders injured and killed by police misconduct, which even the Court of Appeals below found in significant part to be tortious as a matter of law, are to be left without any remedy whatsoever.

Second, this Court should review the limitations that ancient immunity doctrines have placed on enforcement of the guarantees of the Fourteenth Amendment and the Civil Rights Acts, all of which were specifically enacted to prevent or redress the sort of tragedy which occurred here by protecting black people from official lawlessness.

Third, this Court should reject the unrealistic concepts of causation imposed by the Court of Appeals because they serve to deny recovery upon Constitutional and Civil Rights Act claims where the proof of specific causation has been rendered impossible by the magnitude of the lawful conduct complained of.

Fourth, the Court should reject the extension of concepts of self defense and suppression of riot to justify the widespread use of deadly force at the price of death and injury to innocent bystanders.

Fifth, this Court should hold erroneous the legal theory under which innocent persons at the site of a demonstration can, by their presence, be said to have "assumed the risk" of being wrongfully shot, and should also hold that a United States Court of Appeals cannot avoid responsibility for reviewing such a charge.*

*There were many other erroneous charges to the jury (*supra,* pp. 19-20; App. E), but the main point is that a proper interpretation of the Constitution and law requires judgment of liability to be entered and not a reversal for a new trial.

From ancient times law has been fashioned to do justice and thereby channel controversy into the courts and avoid retribution outside the law. Today, more than ever, this goal is a paramount need which reflects the conscience in our society and our law. No violation of right should be without remedy.

The Court should take this case to reemphasize that no governmental misconduct can be above the law, to correct a specific injustice, to clarify important constitutional and legal principles, and to do so in an increasingly common context where citizens need to know just what it is governments can do to them within the law, governments need to know what they cannot do, and people require assurance that courts will furnish remedies for the violation of their rights.

A. THERE MUST BE A REMEDY FOR CONSTITUTIONAL AND CIVIL WRONGS AND THAT REMEDY CANNOT BE DENIED BECAUSE A GREAT MANY PEOPLE ACT UNLAWFULLY TOGETHER.

Suppose that all the shooting had been done by a single officer. Clearly petitioners would then have been entitled to judgment as a matter of law. To shoot at an alleged sniper in an upper window and then to rake the ground far from that location—*i.e.,* to use deadly force on innocent bystanders like petitioners or their decedents, who were outside the "physical limits of [any] justifiable response" would be an open and shut case for liability.

Of course, the actual facts are far *more* compelling. The massive, undisciplined use of firepower by 69 officers, all acting contrary to their training as well as repeated cease fire orders, is far *more* serious and dangerous. Yet the effect of the Court's decision is to relieve everyone from liability because the wrongdoing was so massive.

The theory of "the worse the better" should not be left enshrined in American jurisprudence.

We proceed to discuss the many theories under which various classes of defendants should have been held liable. But as one deals with those substantive and procedural niceties, a simple principle of justice should remain paramount—not ignored as we believe it was by the Court of Appeals.

Petitioners and their decedents were wrongfully shot. For the wrong done to them a remedy must exist. As stated by the first Mr. Justice Marshall in another context:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 163 (1803).

B. ENFORCEMENT OF THE FOURTEENTH AMENDMENT REQUIRES THAT THE STATE BE HELD LIABLE.

This is obviously a situation where the most just result is to hold the State (and the City) liable. As we show below, each of the individual officers is liable for their part in the excessive firing which resulted in the deaths and injuries at issue. But, whatever causation problems there are for individual defendants, it is clear that agents of the State (and City), acting on their behalf, used illegal official force to kill and wound petitioners or their decedents. In such circumstances all other kinds of major institutions in our society would be held liable under principles of respondeat superior and policy judgments favoring an equitable spreading of risks.

Does immunity insulate the State of Mississippi?

Dicta in opinions of this Court appear to support immunity. But no holding forecloses liability, and the Court has

expressly left open the question posed here. The cases which appear to the contrary are inapplicable and their circumstances and reasoning distinguishable. In any event, the arguments which we believe to be compelling here were not made in those cases. Most importantly, this nation's constitutional history compels rejection of immunity in this case.

1. The State's Defense of Sovereign Immunity Here Is Inconsistent with Our Constitutional History.

The states that seceded from the Union did so in the name of state sovereignty.* Their aim was to eliminate interference with their "sovereign" right to separately define the rights of their respective populations—including the "sovereign" power to deprive black slaves of any claim of right to liberty, as well as life and property.

The Civil War was fought and they lost. The victors then did more than simply restore the status quo. Through the War Amendments, particularly the Fourteenth Amendment, they fundamentally and permanently altered the relationship between the states and the national government through the higher law of the Constitution. In this, the second American Revolution, the states were expressly deprived of their prior absolute sovereignty in the very arena here involved. "No State", it was established, shall "deprive any person of life, liberty, or property, without due process of law".

Could it be that those striving to achieve a just national reunification, through change in the basic fabric of our

*The preamble to the Confederate Constitution "recited that each state acted 'in its sovereign and independent character, in order to form'—not a 'more perfect union' but 'a permanent federal government.' . . . The constitution was ordained, not by a consolidated people, but by 'the people of the Confederate States, each State acting in its sovereign and independent character.' " J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 157-58 (2d ed. 1969).

system, would suppose a state could send its agents into the streets to shoot innocent bystanders, the descendents of the very people the Amendment was most concerned with, and then hide behind the pre-Civil War doctrine of state sovereignty? Surely in those circumstances one would expect that—absent some overwhelming reason to believe the framers of the Fourteenth Amendment had some reason to insulate the states—they did not do so.

In fact, the Reconstruction Congress found it proper and essential to override a far more significant attribute of state sovereignty than a claim of right to avoid being sued for a federal wrong in a federal court. After the Congress had proposed the Amendment, it initially failed of ratification by the requisite three-quarters of the states. Of the eleven former Confederate States only Tennessee initially ratified the Amendment. The other ten rejected it as an affront to states rights.* Congress promptly resolved in the

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*The Mississippi legislature had initially unanimously rejected the amendment as a "gross usurpation of the rights of the States", H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 203 (1965), citing ANNUAL CYCLOPAEDIA 521 (1866). After it had become part of the Constitution, however, Mississippi ratified it in order to be able to regain full participation in the Union. *Id.* at 191.

It is plain from the positions taken by those opposing the Amendment that it was viewed as a radical change in the original Constitution's acceptance of state sovereignty. Thus, Representative Rogers:

> "When sifted from top to bottom it will be found to be the embodiment of centralization and the disfranchisement [*sic*] of the States of those sacred and immutable State rights which were reserved to them by the consent of our fathers in our organic law." CONG. GLOBE, 39th Cong., 1st Sess. app. 133 (1866).

So Representative Hale:

> "It does seem to me that the tenor and effect of the amendment proposed here by this committee is to bring about a more radical change in the system of this Government, to institute a wider departure from the theory upon which our fathers formed it than ever before was proposed in any legislative or constitutional assembly." CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).

act of March 2, 1867, that (i) none of the excluded states would be restored to full membership in the Union until the Amendment became part of the Constitution; and (ii) no particular state would regain its full rights until it individually ratified the Amendment. All complied.* J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 633 (2d ed. 1969).

Thus, as a condition precedent to being again part of this nation, the secessionist states made a binding pact with the rest of the nation that they would honor and respect the higher law of the Union. Specifically, in as many words, they promised they would not "deprive any person of life, liberty or property, without due process of law". Petitioners and their decedents were certainly intended to be among the direct beneficiaries of that compact and promise. Just as this Court held in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 443 (1968), that the "promise" of the Thirteenth Amendment could only be fulfilled by an effective remedy to ensure open housing for black people, here the promise of the Fourteenth Amendment can only be fulfilled by granting an effective remedy against the State which so flagrantly violated it.

2. Holding the State Is Not Immune from Fourteenth Amendment Claims of the Sort Made Here Is Not Inconsistent with Prior Decisions of this Court.

The very concept of sovereign immunity, rooted in the theory that the "king can do no wrong", has been recog-

*As we show in the next section, the Eleventh Amendment, and the cases extending its principle to suits by citizens against their own state, are based upon an understanding of state sovereignty held by the founding fathers and their immediate successors and incorporated by them in the original (pre-Civil War) Constitution. It was those theories which the Fourteenth Amendment rejected—as its opponents recognized before they ratified it.

nized as an anomaly in a republican form of government. *See, e.g.,* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 1-2 (1963).* Perceiving this, Mr. Justice Holmes sought to articulate for this Court another theory:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353 (1907).

That justification is simply inapplicable in this case. Here, the "authority that makes the law on which the right depends" is not the State of Mississippi, but a higher law—the United States Constitution—which was amended for the specific purpose of taking power away from the State.**

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*There has been substantial erosion of this concept of immunity by the actions of state courts in the twentieth century. *Evans* v. *Board of County Comm'rs,* 174 Colo. 97, 482 P. 2d 968 (1971); *Smith* v. *Idaho,* 93 Idaho 795, 473 P. 2d 937 (1970); *Holytz* v. *City of Milwaukee,* 17 Wis. 2d 26, 115 N. W. 2d 618 (1962). It is virtually extinct in so far as actions against the United States are concerned—both because of legislation (the Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842, passed in 1946, and the Tucker Act, ch. 359, 24 Stat. 505, passed in 1887) and because of judicial decisions. *See, e.g., Lord* v. *Kelley,* 223 F. Supp. 684 (D. Mass. 1963), *appeal dismissed,* 334 F. 2d 742 (1st Cir. 1964), *cert. denied,* 379 U. S. 961 (1965).

Indeed, claims of absolute immunity made by one branch of the national government against another have been recently rejected by this Court, again because such claims must yield to the command of the Constitution's higher authority. *United States* v. *Nixon,* 94 S. Ct. 3090, 3100 (1974); *Powell* v. *McCormick,* 395 U. S. 486, 548-49 (1969).

**Language in Mr. Justice Holmes' opinion appears to recognize the distinction:

> "It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. *But the rights that exist are not cre-*

While it is true that in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), the Court held that Louisiana was immune from a suit brought by its own citizens, neither *Hans* nor the many subsequent decisions relying upon it should be read to support the claim of immunity asserted here. *Hans* involved a claim under the pre-Civil War Constitution and its reasoning depends entirely upon analysis of what the founding fathers thought they were creating in the "organic law" (*supra,* p. 25 n.), which the Fourteenth Amendment altered.

The *Hans* Court reasoned that the original framers had expected the states to be immune from suit because they relied upon " 'the conscience of the sovereign' " states, *id.* at 13, and concluded that:

> "to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." *Id.* at 21.

By ratifying the Fourteenth Amendment, however, the states explicitly surrendered the right to decide what their "honor and safety" might require in the area of civil rights. And the compulsion of the Constitution replaced conscience.

After *Hans,* this Court, without mention of the foregoing points and, we believe, without the points ever being argued by a party, has relied upon *Hans* (or the Eleventh

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ated by Congress or *the Constitution,* except to the extent of certain limitations of power." 205 U. S. at 353-54. (Emphasis added)

Similarly, in *Great N. Life Ins. Co.* v. *Read,* 322 U. S. 47 (1944), this Court, in finding Eleventh Amendment immunity for Oklahoma under the circumstances of that case, stressed that a sovereign should be "free from judicial compulsion in the carrying out of its policies *within the limits of the Constitution.*" *Id.* at 51. (Emphasis added)

Amendment) in cases arising under the civil rights statutes. However, in 1908 the Court expressly left open whether the Fourteenth Amendment "altered or limited the effect" of the Eleventh Amendment. *Ex parte Young,* 209 U. S. 123, 150 (1908). And, as noted last term in Mr. Justice Marshall's dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 694 n. 2 (1974), the Court has

> "not decide[d] whether the States' Eleventh Amendment sovereign immunity [nor any sovereign immunity read into the original Constitution by *Hans*] may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment".

Nor does *Edelman* or any other case stand for the proposition that there can be a constitutional right without a remedy. There, this Court upheld injunctive relief ordering future expenditure of state funds. An *Edelman*-type suit can be commenced as soon as a Fourteenth Amendment wrong is committed, so injunctive relief could be a complete remedy. Here, of course, injunctive relief was not—and could not have been—an available remedy at any time. Similarly, *Hans* stressed the availability of other remedies. 134 U. S. at 21.

The aim of the Fourteenth Amendment was to establish for all the states, South and North, a constitutional rule which would place rights to life and liberty beyond any contrary claim of state sovereignty and would guarantee redress through law for wrongs committed by a state against those rights. As Congressman Bingham, a member of the Committee of 15 and the author of the part of the Amendment at issue here, stated during debate over a bill concerning recognition of the then existing governments of

ten southern states, the Fourteenth Amendment was designed to ensure that:

> "[W]hen either Ohio or South Carolina or any other State shall in its madness or its folly refuse to the gentleman or his children or to me or to mine any of the rights which pertain to American citizenship or to a common humanity, *there will be redress for the wrong through the power and majesty of American law.*" CONG. GLOBE, 40th Cong., 2d Sess. 514-15 (1868). (Emphasis added)

As we show next, a damage award is in this case the normal and necessary remedy by which to obtain "redress for the wrong through the power and majesty of American law".

3. Mississippi Is Liable for Depriving Its Citizens of Life and Liberty Without Due Process of Law.

As this Court held in *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388 (1971), citing *Bell* v. *Hood*, 327 U. S. 678 (1946):

> "'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" 403 U. S. at 392.

Accordingly, *Bivens* held, as *Bell* had implied, that there was a federal claim for damages for violation of petitioners' Fourth Amendment rights. *See City of Kenosha* v. *Bruno*, 412 U. S. 507, 516 (1973) (Brennan, J., concurring); *Howell* v. *Cataldi*, 464 F.2d 272, 274-75 (3d Cir. 1972) (applying *Bivens* to claim against state officials which relied upon the Eighth Amendment as incorporated in Fourteenth Amendment).

Here, the state has invaded "federally protected rights"—rights created by the express limitations placed upon state conduct by the Fourteenth Amendment.* Thus, under *Bivens,* this is a proper constitutional claim of liability against the State of Mississippi, and the federal courts should "grant the necessary relief".

The Fourteenth Amendment's Due Process Clause has long been construed to protect citizens' rights to property from infringement by states or state agencies having a delegated power of eminent domain. *Chicago B. & Q. R.R.* v. *Chicago,* 166 U. S. 226, 233-41 (1897). And in *Jacobs* v. *United States,* 290 U. S. 13, 16 (1933), the Court held that the right to just compensation rested upon the Fifth Amendment and "[s]tatutory recognition was not necessary".

Why, particularly after *Bivens,* should citizens' rights to life and liberty be unprotected while their property rights are guaranteed?

Moreover, this Court has frequently recognized a right to recovery where none had previously existed when that right will assure "vindication of federal policies". *Moragne* v. *States Marine Lines, Inc.,* 398 U. S. 375, 401 (1970). Here, as in *Moragne,* the rule applied by the Court of Appeals to relieve the State of Mississippi (and City of Jackson) from liability is " 'barbarous' ", and here, as there, there is no "clear and compelling justification for what

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*District court jurisdiction over the Fourteenth Amendment claim is based upon both 28 U. S. C. §§ 1331 and 1343—as pleaded, the matter in controversy "arises under the Constitution" and was commenced to "redress the deprivation" of constitutional rights and exceeds the sum of $10,000.

Moreover, even if the Fourteenth Amendment were held not to constitute an exception to the jurisdictional limitations of *Hans* (or the Eleventh Amendment), the district court could take jurisdiction of a claim otherwise outside its original jurisdiction where that claim arises out of the same facts as a claim within its original jurisdiction. *United Mine Workers of America* v. *Gibbs,* 383 U. S. 715, 725 (1966); *see Rosado* v. *Wyman,* 397 U. S. 397, 402-05 (1970).

seems a striking departure from the result dictated by elementary principles in the law of remedies". *Id.* at 381. *See also Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971) (implying a federal right of action for damages for violation of SEC regulations under section 10(b) of the Securities Exchange Act); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (the same for violation of SEC proxy rules); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944) (the same for violation of a union's statutory duty to represent workers without racial discrimination).

Again, there is no reason why petitioners' explicit federal constitutional rights to life and liberty should fare less well than implied federal rights established for commercial and labor matters by a federal statute or federal agency regulations.

Our constitutional commitment to protect the people against governmental misconduct has, since the Civil War, been progressively made more effective by action of this Court. Prior to the Civil War, in cases such as *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857), and *Barron* v. *Baltimore*, 32 U. S. (7 Pet.) 243 (1833), the Court read the original Constitution as leaving the sovereign states alone in such matters. For many years following the Civil War (through and beyond the time the Court decided *Hans*), the Court construed the Fourteenth Amendment in ways that substantially limited its significance. More recently in areas ranging from civil rights,* to privacy,** to speech,†

**Compare Plessy* v. *Ferguson*, 163 U. S. 537 (1896), *with Brown* v. *Board of Educ.*, 347 U. S. 483 (1954).

***Compare Buck* v. *Bell*, 274 U. S. 200 (1927), *with Roe* v. *Wade*, 410 U. S. 113 (1973).

†*Compare Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), *with New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

to criminal procedural guarantees,* to the apportionment of election districts** the Court has overruled or distinguished away older cases in favor of finding remedies to check or redress governmental interference with citizens' rights.

The Constitution is a living document, to be interpreted according to Mr. Chief Justice Marshall's exhortation that "we must never forget that it is a *constitution* we are expounding". *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 407 (1819). Here, as was the case in *Moragne*, constitutional law has "furnish[ed] a clear guide for the conduct of individuals [here states] . . . enabl[ing] them to plan their affairs with assurance against untoward surprise". 398 U. S. at 403. Thus here, as in *Moragne*, there should be a "remedial rule to effectuate well-established primary rules of behavior". *Id.* And here the only effective remedy is damages which are the "particular remedial mechanism normally available in the federal courts". *Bivens* v. *Six Unknown Agents*, 403 U. S. 388, 397 (1971).

C. THE CITY OF JACKSON IS SIMILARLY LIABLE.

Neither the Eleventh Amendment nor *Hans* affects the liability of the City of Jackson, but, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court held 42 U. S. C. § 1983 did not cover actions against municipalities.† However, in *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), where the majority applied *Monroe* to bar relief, it expressly noted the failure of the parties to brief the issue of alternative jurisdiction under 28 U. S. C. § 1331 and accordingly

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*Compare *Twining* v. *New Jersey*, 211 U. S. 78 (1908), *with Malloy* v. *Hogan*, 378 U. S. 1 (1964).

**Compare *Colegrove* v. *Green*, 328 U. S. 549 (1946), *with Baker* v. *Carr*, 369 U. S. 186 (1962).

†Subsequent analysis of the legislative history relied upon in *Monroe* might suggest reexamination of that decision. Note, *Developing Governmental Liability Under 42 U. S. C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971).

withheld decision on that question. 412 U. S. at 514. As noted in Mr. Justice Brennan's concurring opinion:

> "I find unimpeachably correct the District Court's conclusion that appellants failed to comply with the requirements of the Due Process Clause in denying renewal of appellees' liquor licenses. Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U. S. C. § 1343. . . . Appellees did assert 28 U. S. C. § 1331 as an alternative ground of jurisdiction, but I agree that the Court's conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. If appellees can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available, *Bell* v. *Hood . . .; cf. Bivens* v. *Six Fed. Narcotics Agents . . .*, and they are clearly entitled to relief." *Id.* at 516.

Subsequently, lower courts have recognized such a claim if, as here, the Constitution and § 1331 have been asserted. *Waltenberg* v. *New York City Dep't of Correction*, 376 F. Supp. 41, 43-44 (S.D.N.Y. 1974); *Manos* v. *City of Green Bay*, 372 F. Supp. 40, 45 (E. D. Wis. 1974).

D. INDIVIDUAL OFFICERS SHOULD NOT BE ABLE TO ESCAPE LIABILITY WHEN EACH ONE SHOT AS PART OF A "CONFUSED MASS REACTION" IN VIOLATION OF ORDERS, HIS OWN TRAINING AND CONTRARY TO UNIVERSALLY ACCEPTED LAW ENFORCEMENT STANDARDS, AND CONTRIBUTED TO THE "EXCESSIVE CUMULATED USE OF DEADLY FORCE".

1. The Court of Appeals Overlooked Its Findings as to Where Petitioners Were Shot.

The Court of Appeals' fundamental error was in holding that the jury might conclude that "harm may have re-

sulted from sources other than those acting tortiously". 502 F.2d at 1283. As established above (*supra*, pp. 3-5, 10-14), at least four of the five petitioners or their decedents could not have been injured by any officer firing within the "physical limits of [any] justifiable response".

2. The "Excessive" Wrongful Firing Was a Common Enterprise in Which Each Participant Is Liable Regardless of Where or Whom His Firing Struck.

Having failed to recognize that at least the students on the ground were killed or injured only as a result of the wrongful gunfire of the officers, the Court of Appeals further erred in failing to apply the principle that all who act in concert in the commission of a wrong are equally liable for the results of the wrongdoing, regardless of which individual wrongdoer may have caused the injury. *See* W. PROSSER, LAW OF TORTS, § 41, at 243 (4th ed. 1971).

Wherever he shot, each and every officer who shot did so wrongfully. Whether a particular officer did hit petitioners or not, each one by shooting contributed to the excessive "confused mass reaction" which led to the deaths and injuries at issue. All are liable under established principles of Mississippi law. *See Moore* v. *Foster*, 182 Miss. 15, 180 So. 73 (1938); *Oliver* v. *Miles*, 144 Miss. 852, 110 So. 666 (1926).

But beyond those principles of Mississippi law, petitioners sued for violation of the federal law which is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions", *Monroe* v. *Pape*, 365 U. S. 167, 187 (1961), as measured by "the prevailing view in this country". *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967). We submit that it is not, nor can it be, the prevailing view in this country that the defendants can escape liability for the excessive and unlawful actions in

this case, simply because the magnitude of the barrage made it impossible to show whose shots hit whom.*

3. The Court's Comments about "Self Defense" and "Riot" Were Irrelevant and, in Any Event, Inconsistent with the Limitations Free Societies Place on the Official Use of Deadly Force.

The only "justification" offered by any defendant for his firing was "self defense", but that defense was refuted by the locations where the dead and wounded were found. (*supra*, pp. 3-6; 17-18) In addition, the uncontradicted testimony of all law enforcement experts established that, considering the danger to hundreds of innocent bystanders, even firing at the supposed sniper was a violation of universally accepted police standards, the officers' own training, and standards defined that night by officers in charge who immediately and repeatedly ordered a cease fire. Nevertheless, the Court of Appeals held that each defendant's rote claim of self defense was sufficient to present a jury question as to his "justification".

That holding, accordingly, means that no police officer need heed his own training, nationally recognized procedures, or the safety of hundreds of innocent bystanders before eschewing non-lethal alternatives in favor of deadly force.**

There is no basis in the record to support the suppression of riot instruction given by the District Court.

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*The Court of Appeals noted, but did not resolve, the anomaly of measuring the overall responsibility of the group by the actions of the individual officers. 502 F.2d at 1272. A correct way to resolve this anomaly, we submit, is to hold the State of Mississippi and City of Jackson liable for the collective excessive actions of their agents (as well as holding the officers liable). In no event is the answer to relieve everyone from liability.

**In addition, that holding abandons the duty each officer had to seek cover or withdraw behind the readily available massive cover of Thompson's Tank which was stopped in the midst of the contingent. (PX 184, Tr. 2794)

Not one of the officers who fired claimed to have done so to suppress a riot [a necessary element of the defense under RESTATEMENT (SECOND) OF TORTS § 142, comment b at 255 (1965)], because as defense counsel conceded on appeal they were not permitted to fire to suppress a riot without a command. (City Br. on Appeal at 3; State Br. on Appeal at 24) There was no command. Thus, defense counsel repeatedly conceded at the trial that the defense did not apply. (Tr. 66, 2975)

Apart from those concessions, the use of medieval concepts of suppression of riot to justify the use of deadly force upon petitioners and their decedents is abhorrent in a free society. The crowd was dispersing—thus the commanding officer did not believe even tear gas was appropriate. Even assuming—contrary to all the points about training, etc., which rebut the self defense excuse—shooting at a sniper could be characterized as "meeting a riot situation", 502 F. 2d at 1281, any such shooting must fall within the "physical limits of [any] justifiable response", and it plainly did not.

E. UNDER A CONSTITUTIONAL SYSTEM, INNOCENT BYSTANDERS DO NOT "ASSUME THE RISK" OF BEING SHOT BY THE POLICE.

The trial court, through its instructions, permitted the jury to find that the petitioners and their decedents assumed the risk of being shot. (Tr. 3231-32) Despite the fact that nothing in the record provides a basis for such a finding, the Court of Appeals failed to reach the District Court's instructions on assumption of risk because it believed that "its other conclusions make it unnecessary". 502 F. 2d at 1286.

But the entire basis of the Court of Appeals decision is that it must give virtually conclusive weight to a jury decision. That jury decision here was a general verdict which could have been based entirely on this erroneous

instruction., *Williams* v. *North Carolina,* 317 U. S. 287, 291-92 (1942). Consequently, the Court of Appeals cannot both put into the hands of the jurors all the decision-making responsibility in this case and refuse to examine all the instructions meant to govern the discharge of that responsibility.

The rule of "law" assumed in giving the instruction is abhorrent. Maybe in a totalitarian society the risk of being shot at and killed by the police is assumed in circumstances such as these, but not here.

The persons shot can hardly have been held to have assumed the risk that a sniper might fire on the officers and that the officers would wrongfully respond by laying down an "excessive" barrage far "beyond the physical limits of [any] justifiable response".

If assumption of risk could be found on these facts, it must therefore be the law that every woman in Alexander Hall (which houses 965 people) (Tr. 1790) should have evacuated the building by the rear exits at midnight on May 14-15, 1970. It also means that JPD Lt. Magee, by commanding students to clear the street (instead of telling them, for example, to leave the city), seriously misled the students, to their detriment. But, of course, what it really means is that any black who ventures near a large group of white officers on duty is subject to being killed or wounded without any recourse.

Thus, the effect of allowing a jury to excuse the shootings on a theory of "assumption of risk" is to confirm one petitioner's conviction that white police officers believe that

> "if they kill a nigger ain't nothing going to be done in no way." (Tr. 301)

That is the effect of the assumption of risk instruction, and is the result of the proceedings below. Under the circumstances present here the result cannot be consistent with our Constitution and laws.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX A

(Constitutional Provisions)

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.